

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

FILED  
U.S. DISTRICT COURT  
DISTRICT OF NEW MEXICO

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UNITED STATES OF AMERICA,

Plaintiff,

*Robert J. McFarlane*  
CLERK OF COURT

vs.

No. CR 99-566 JC

RICKY LEE MCDONALD,

Defendant.

MOTION TO DISMISS COUNTS II, III AND IV - SPEEDY TRIAL

COMES NOW the defendant by and through counsel and, pursuant to U.S. Const. Amend. VI, 18 U.S.C. § 3161(e), and applicable statutes and rules, moves this court to dismiss with prejudice Counts II, III, and IV of the Second Superseding Indictment in this case because retrial has not commenced within seventy (70) days of the Court's acceptance of the jury's "hung" verdict and discharge of the jury on June 28, 2001. As grounds, defendant states:

1. A jury was empaneled June 26, 2001, to hear the charges pending against Mr. McDonald in the Second Superseding Indictment.
2. On June 28, 2001, that jury convicted Mr. McDonald of the charge at issue in Count I of the Indictment and wrote on the verdict form that it was "hung" with respect to Counts II, III, and IV. (Verdict, attached) The court dismissed the jury on June 28, 2001. The acceptance and filing of the Verdict form and dismissal of the jury constitute

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an “action occasioning the retrial” within the meaning of 18 U.S.C. § 3161(e).

3. 18 U.S.C. § 3161(e) requires retrial within seventy (70) days of the date an action occasioning retrial becomes final. *See, U.S. v. Doran*, 882 F.2d 1511, 1514 (10<sup>th</sup> Cir. 1989); *U.S. v. Scalf*, 760 F.2d 1057 (10<sup>th</sup> Cir. 1985). This seventy day period expired September 6, 2001.

4. Upon information and belief, none of the periods of delay of 18 U.S.C. § 3161(h) are applicable in this case. The court’s docket sheet (attached) shows only the filing of the clerk’s minutes (June 29, 2001) and the filing of a Notice of Sentencing (September 20, 2001) since the filing of the Verdict Form on June 28, 2001.

5. 18 U.S.C. § 3161(e) states that the sanctions of § 3162 apply to this subsection. 18 U.S.C. § 3162(2) states that if a defendant is not brought to trial within the time limits of 18 U.S.C. § 3161 “the information or indictment shall be dismissed on motion of the defendant.” That section further states that the defendant has the burden of supporting his motion but the government has the burden of going forward with evidence in connection within an exclusion of time under subparagraph 3161(h)(3).

6. 18 U.S.C. § 3162(2) further states that in determining whether to dismiss the case with or without prejudice, the court shall consider, among other things, each of the following factors: “the seriousness of the offense; the facts and circumstances of the case which led to the dismissal; and the impact of a reprosecution on the administration of this chapter and on the administration of justice.”

7. Applying these factors: (i) *the seriousness of the offense*; the offense at issue in Count II carries a sentence of not less than five and not more than 20 years imprisonment. The offense at issue in Count III carries a maximum sentence of three years imprisonment. The offense at issue in Count IV carries a mandatory minimum ten year sentence. Pursuant to 18 U.S.C. § 3559, Sentencing classification of offenses, the offense at issue in Count II is a Class B felony. The offense at issue in Count III is a Class E felony. The offense at issue in Count IV is a Class C felony. *See also*, 18 U.S.C. § 3581(b). While there was some property damage, none of the offenses at issue caused any personal, physical injury. None of the counts at issue is a drug offense or a sex offense. Had Mr. McDonald been convicted of all counts, the guideline sentence and mandatory minimum sentence at issue in Counts I, II, III and IV would all total less than the statutory maximum sentence available under Count I (20 years). All things considered, the offenses at issue in this motion are not so serious as to prohibit dismissal with prejudice. (ii) *The facts and circumstances of the case which led to dismissal*; upon information and belief, and based on counsel's occasional consultations with the government regarding this matter, delay in the government's decision about whether to pursue retrial in this matter was occasioned primarily by the fact that the Department of Justice in Washington, D.C. was involved in this decision. Delay due to the government's decision making process "has nothing to do with the 'unavailability of witnesses or other factors resulting from the passage of time'" and does not justify the

speedy trial violation in this case. *U.S. v. Scalf*, 760 F.2d 1057, 1059 (10<sup>th</sup> Cir. 1985)(Delay due to government's decision whether to seek certiorari does not excuse speedy trial violation). (iii) *The impact of a reprosecution on the administration of this chapter and on the administration of justice*; reprosecution under this scenario would diminish the seriousness of a clear speedy trial violation. Dismissal with prejudice would not adversely impact the administration of justice. As set out above, Mr. McDonald already faces a mandatory minimum five year sentence and a maximum sentence of twenty years based on the count of which he was convicted. This case was first filed in the U.S. District Court for the District of New Mexico in May of 1999. The case has had a long and difficult history because of Mr. McDonald's mental health problems. Further delay would only exacerbate those problems and would make retrial very difficult from this perspective. While incarcerated at the local county jail, Mr. McDonald receives very little mental health treatment. He spends most of his days alone in his cell with his voices and his apparitions and his "whole-y Bible." Mr. McDonald recently carved a cross approximately five inches in length into his chest. The sooner Mr. McDonald is sentenced, the sooner he can be sent to a federal medical center for prisoners where he will receive more appropriate mental health treatment.

8. Counsel for the government, AUSA Mary Catherine McCulloch, opposes this motion.

WHEREFORE, the defendant respectfully requests this court to dismiss Counts II,

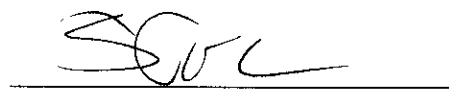
III and IV of the Second Superseding Indictment in this case with prejudice, and for such other and further relief as the deems proper.

Respectfully submitted,

I hereby certify that a true copy of the foregoing was delivered to AUSA Mary Catherine McCulloch at the U.S. Attorney's box at the U.S. Courthouse, Albuquerque, NM, this 25<sup>th</sup> day of September 2001.



FEDERAL PUBLIC DEFENDER  
111 Lomas NW, Suite 501  
Albuquerque, NM 87102  
(505) 346-2489

  
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Stephen P. McCue  
Attorney for Defendant

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEW MEXICO

UNITED STATES OF AMERICA,

Plaintiff,

vs.

RICKY LEE MCDONALD,

Defendant

**FILED**  
UNITED STATES DISTRICT COURT  
ALBUQUERQUE, NEW MEXICO

JUN 28 2001

No. CR 99-566 JC

*R. Thomas*  
CLERK

**VERDICT**

WE, THE JURY, find the Defendant, Ricky Lee McDonald, GUILTY  
(guilty/not guilty) on the charge of malicious damage or attempt to damage a building by means  
of fire as charged in Count I of the Second Superseding Indictment;

WE, THE JURY, find the Defendant, Ricky Lee McDonald, HUNG  
(guilty/not guilty) on the charge of malicious damage or attempt to damage a building by means  
of fire as charged in Count II of the Second Superseding Indictment;

WE, THE JURY, find the Defendant, Ricky Lee McDonald, HUNG  
(guilty/not guilty) on the charge of Freedom of Access to Clinic Entrances as charged in Count  
III of the Second Superseding Indictment;

WE, THE JURY, find the Defendant, Ricky Lee McDonald, HUNG  
(guilty/not guilty) on the charge of use of fire or an explosive to commit any felony as charged in  
Count IV of the Second Superseding Indictment.

DATED this 28 day of JUNE, 2001.

2:30 PM

*Chad L. Smith*

FOREPERSON

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**Docket Report for: USA v. McDonald****Case Number: 99cr00566 (ACE)**

File Date	EOD	Num	Description	Ref
09/20/01	09/24/01	107	NOTICE of Hearing for deft Ricky Lee McDonald sentencing hearing set on 10/18/01 @ 2:00 pm before Senior Judge Conway in Albuquerque, NM (cc: all counsel*) (dmw) (7k)	dfs
06/29/01	06/29/01	101	CLERK'S MINUTES: before Senior Judge John E. Conway jury impaneled, finding Ricky Lee McDonald guilty on count 1ss C/R: Syd Huseby (dmw) (21k)	dfs
06/28/01	07/02/01	106	VERDICT: guilty as to Ricky Lee McDonald on count I & hung on counts II, II & IV of second superseding indictment (dmw)	
06/28/01	07/02/01	105	COURT'S INSTRUCTIONS TO THE JURY submitted by Senior Judge John E. Conway (dmw)	
06/28/01	07/02/01	104	NOTE to jury from Judge Conway to begin deliberations (dmw)	
06/28/01	07/02/01	103	NOTES to Judge Conway from jury (dmw)	
06/27/01	07/02/01	102	NOTE to jury from Judge Conway re continuation of deliberations (dmw)	
06/26/01	06/27/01	99	SEALED SUPPLEMENTAL ORDER by Senior Judge John E. Conway [for free process (sealed) as to Ricky Lee McDonald] (cc: defense counsel) (dmw)	
06/26/01	06/27/01	98	SEALED ORDER by Senior Judge John E. Conway to seal document (cc: defense counsel) (dmw)	
06/26/01	06/26/01	97	RESPONSE by defendant to motion in limine to prevent deft from eliciting testimony from government witnesses related to any mental illness, disease or defect [96-1] (dmw) Re: MOTION in limine to prevent deft from eliciting testimony from government ... [96]	
06/25/01	06/28/01	100	CJA Form 20 Copy 4 (Appointment of Counsel) for material witness Duane Garcia appointing Penni Adrian (dmw)	
06/25/01	06/26/01	96	MOTION [in limine to prevent deft from eliciting testimony from government witnesses related to any mental illness, disease or defect] by USA as to Ricky Lee McDonald (dmw) Re: RESPONSE [97]	